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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 UNITED STATES OF AMERICA,
8 Plaintiff,
9 v.
10 DAVID ALAN COHEN,
11 Defendant.

Case No. 2:17-cr-00114-APG-CWH

ORDER

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13 Presently before the court is pro se defendant David Alan Cohen's motion for a bill of
14 particulars (ECF No. 240), filed on June 28, 2018. The government filed a response and
15 counter-motion to strike (ECF Nos. 241, 242) on June 29, 2018. Mr. Cohen filed a reply (ECF
16 Nos. 248, 249) on July 9, 2018.

17 **I. BACKGROUND**

18 On September 23, 2016, a criminal complaint was issued, charging defendant with
19 possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5) and receipt of child
20 pornography, in violation of 18 U.S.C. §§ 2252A(a)(2) and (b). (Compl. (ECF No. 1).) On April
21 12, 2017, a federal grand jury indicted defendant, alleging that beginning on a date unknown and
22 continuing to on or about September 21, 2016, he knowingly possessed child pornography and
23 any material that contains child pornography, in violation of 18 U.S.C. § 2256(8), and received
24 and distributed child pornography and any material that contains child pornography, as defined in
25 18 U.S.C. § 2256(8), all in violation of 18 U.S.C. §§ 2252A(a)(5) and 2252A(a)(2) and (b).
26 (Indictment (ECF No. 37).)

27 On June 13, 2018, a federal grand jury issued a superseding indictment including the same
28 allegations, as well as an additional allegation that defendant was previously "convicted under the

1 laws of the State of New York with aggravated sexual abuse, sexual abuse, and abusive sexual
2 conduct involving a minor, to wit: Sodomy in the Second Degree” (Superseding Indictment
3 (ECF No. 228).) The pretrial motions deadline in this case expired on May 14, 2017. (Order
4 Regarding Pretrial Procedure (ECF No. 42).)

5 Defendant now moves for a bill of particulars asking for details supporting the allegations
6 in Count 2, including the manner in which the child pornography was received or distributed by a
7 means or facility of interstate commerce and which images provided in discovery are alleged to
8 have been received or distributed. As for both Counts 1 and 2, defendant requests a list of which
9 specific images are alleged to be the child pornographic images at issue. The government
10 responds that defendant’s motion is untimely because it was filed more than one year after the
11 court-ordered pretrial motions deadline and should be stricken under the court’s inherent power to
12 control its docket. The government further responds that the indictment is sufficient and that the
13 government has provided full discovery. According to the government, defendant’s motion is an
14 improper attempt to gain information regarding the government’s theory of criminal liability and
15 evidentiary details outside the scope of proper discovery. Defendant replies that the motion is
16 timely under Rule 7 of the Federal Rules of Criminal Procedure because it was filed within 14
17 days of his arraignment on the superseding indictment.

18 **II. DISCUSSION**

19 The indictment must be a “plain, concise, and definite written statement of the essential
20 facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). Rule 7(f) of the Federal Rules
21 of Criminal Procedure provides that:

22 The court may direct the government to file a bill of particulars. The defendant
23 may move for a bill of particulars before or within 14 days after arraignment or at
24 a later time if the court permits. The government may amend a bill of particulars
subject to such conditions as justice requires.

25 Under Local Criminal Rule 12-1(b)(3), in the District of Nevada, a motion for a bill of particulars
26 must be filed within 30 days from the arraignment. “The bill of particulars has three functions:
27 ‘[1] to inform the defendant of the nature of the charge against him with sufficient precision to
28 enable him to prepare for trial, [2] to avoid or minimize the danger of surprise at the time of trial,

1 and [3] to enable him to plead his acquittal or conviction in bar of another prosecution for the
2 same offense when the indictment is itself too vague, and indefinite for such purposes.” *United*
3 *States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1980), *cert. denied* 444 U.S. 979 (1979) (quotation
4 omitted); *see also United States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991) (identifying the
5 threefold purpose of a bill of particulars). “A defendant seeking particularization ‘has the burden
6 of showing by brief, affidavit, or otherwise that nondisclosure would lead to prejudicial surprise
7 or the obviation of opportunities for meaningful defense preparation.” *United States v. Jones*,
8 2:12-cr-00400-APG-GWF, 2013 WL 5954489, at *4 (D. Nev. Nov. 6, 2013).

9 Here, defendant was arraigned on the superseding indictment on June 20, 2018. (Mins. of
10 Proceedings (ECF No. 234).) Defendant filed his motion for bill of particulars eight days later.
11 (Mot. for Bill of Particulars (ECF No. 240).) The court notes, however, that the defendant is not
12 seeking particularization as to the new allegations in the superseding indictment regarding
13 defendant’s prior criminal conviction. Rather, defendant seeks a bill of particulars as to
14 allegations that were included in the original indictment, and he does not articulate why he waited
15 for more than one year after the motions deadline expired to bring this motion. Regardless,
16 because Rule 7 provides that a bill of particulars may be issued at any time with court approval,
17 the court will consider the motion on its merits.

18 Setting aside the question of the timeliness of the motion, the court agrees with the
19 government that defendant’s motion should be denied on the merits. The indictment sufficiently
20 describes defendant’s conduct in the alleged receipt and distribution of child pornography such
21 that defendant may understand the nature of the charges against him and is able to prepare for
22 trial and avoid or minimize the danger of surprise. Although defendant argues for the first time
23 on reply that he has not received full discovery, the matters on which he is seeking
24 particularization are not obtainable by way of a bill of particulars as they request a detailed
25 disclosure of the government’s evidence and strategy for trial. The law is clear that a bill of
26 particulars is not a discovery device. As stated in *Giese*, “[a] defendant is not entitled to know all
27 the [e]vidence the government intends to produce, but only the [t]heory of the government’s
28 case.” 597 F.2d at 1181. Under the circumstances, the court finds that the defendant may

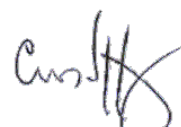
1 adequately prepare his defenses and that there is a low risk of surprise at trial. The court therefore
2 will deny defendant's motion for a bill of particulars.

3 **III. CONCLUSION**

4 IT IS THEREFORE ORDERED that defendant David Alan Cohen's motion for a bill of
5 particulars (ECF No. 240) is DENIED.

6 IT IS FURTHER ORDERED that the government's motion to strike (ECF No. 242) is
7 DENIED.

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9 DATED: July 18, 2018

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13 C.W. HOFFMAN, JR.
14 UNITED STATES MAGISTRATE JUDGE
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